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June 21, 1993

Ms. Donna M. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Rate Regulation
MM Docket No. 92-266

Dear Ms. Searcy

On behalf of Wometco Cable Corp., Georgia Cable TV and Communications, Susquehanna Cable Co., Verto Corporation and Barden Cablevision of Inkster Limited Partnership, there are submitted herewith an original and nine copies of their joint Petition for Reconsideration of the Commission's Report and Order, FCC 93-117

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SUMMARY

Petitioners are operators of cable television systems serving in excess of 600,000 subscribers and located in eight states.

The Commission should rescind its announced benchmark rates. Those rates were devised based on inadequate information from an insufficient number of cable community units. There is no assurance that some or all of the community units surveyed by the FCC have rates which reflect the kind of stable, marketplace conditions on which the Commission might properly have relied. Indeed, many of the units considered by the FCC to be facing effective competition are likely to have rates below competitive market rates. In addition, the benchmark rates are based on concededly inaccurate data and are premised on arbitrary and capricious analytic and statistical assumptions.

The FCC's failure to take into consideration the varying costs faced by cable systems also renders the benchmark rates invalid. Cable system costs differ greatly depending upon geographic locality and depending also upon whether the cable operator is a sufficiently large organization (such as an MSO) to achieve economies of scale and to obtain volume buying and other price discounts on programming and equipment. The FCC's failure to consider cost variables in devising the benchmark rates is also contrary to the 1992 Cable Act, which requires that costs be considered. The benchmark rates are also contrary to the Act because they do not allow for a reasonable return on investment.

For all of these reasons. the announced benchmark rates

The Commission should adopt new benchmark rates for basic cable service based on adequate, accurate data, including data relating to cable system costs and a fair return on investment. The FCC should not adopt any benchmark rates for non-basic cable programming service. To apply benchmark rates to non-basic service is contrary to the intent of Congress, because Congress intended that non-basic service be regulated only in instances in which serious departures exist from the industry norm for cable programming service rates. If the agency continues to use benchmark rates as part of its regulatory scheme governing cable program service rates, it should devise a separate set of benchmark rates for cable programming service. It should not attempt to employ the same benchmark rates for both basic and non-basic service, because this is contrary to the intent of Congress.

The effective date of the FCC's cable rate regulations should be at least 60 days after all aspects of the relevant rate regulation rules (including cost of service showing rules) have been announced and finalized, and after all necessary forms have been issued.

Cable systems should be allowed to implement their permitted annual rate increase on the anniversary date of the system's most recent prior rate increase (including a prior increase which occurred before the system became subject to rate regulation), without regard to whether any proceeding remains pending relating to the nature of the system's current rates.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
	)	
Rate Regulation	)	

To: The Commission

PETITION FOR RECONSIDERATION

Wometco Cable Corp., Georgia Cable TV and Communications, Susquehanna Cable Co., Verto Corporation and Barden Cablevision of Inkster Limited Partnership (collectively "Petitioners"), by counsel and pursuant to 47 C.F.R. § 1.429, hereby request reconsideration of the Commission's Report and Order, FCC 93-117 (rel. May 3, 1993) ("Report and Order") in this proceeding.

I. Statement of Interest

Petitioners are the owners and operators, directly or through subsidiaries, of cable television systems located in Georgia, Illinois, Indiana, Maine, Michigan, Mississippi, Pennsylvania and Rhode Island. Petitioners' cable systems serve in excess of 600,000 subscribers. As the owners and operators of cable television systems, Petitioners will be directly affected by, and therefore have a direct interest in, the rules which the Commission adopted in the Report and Order in this proceeding.

II. The Commission's Benchmark Rates are Invalid Because They Are Derived by Invalid Methods.

A. The Cable System Survey Data Used to Create the Benchmark Rates is Inadequate and Invalid.

According to the FCC's data base, there are nearly 30,000 cable community units in this country. The FCC developed its benchmark cable rates by consulting information received regarding only 1,107 of those units, or less than four percent of all units. Of this small sample, only 141 -- less than half of one percent of all units -- were found by the FCC to be facing "effective competition" under the statutory standards of the 1992 Cable Act.

Of these 141 units supposedly facing competition, 79 were so considered because they met the "less than 30% penetration" standard; 16 were so considered because they met the "owned by/competing with franchise authority" standard; and 46 were so considered because they met the "50% reach/15% penetration" standard for "effective competition." There is no assurance, however, that some or all of these units have rates which reflect the kind of stable, marketplace competition on which the Commission might properly have relied.

Units which meet the less than 30% penetration standard may or may not be facing competition. There are obviously many reasons other than competition which could account for a below 30%

penetration rate.[1/] The 16 units considered to be facing effective competition because they are operated by, or are in competition with a cable system operated by, a franchising authority also may not have rates reflective of a competitive environment. In fact, the rates charged by these systems are almost certainly well <u>below</u> true market levels. Governmental franchising authorities enjoy obvious cost-side advantages (free rights-of-way, dispensation from franchise fees, and the like).[2/] Government-owned cable systems may also have a "ballot-box" incentive to set cable television rates artificially low and to cross-subsidize such rates with other municipal taxes or revenues. Similarly, private cable systems forced to compete with a government-owned system are necessarily compelled to operate with below-market rates comparable to those charged by the government-owned system.

The remaining 46 units considered by the Commission to be facing effective competition because they meet the 50% reach/15%

"price war." Operators facing such competition routinely cut their rates well below market and frequently below cost in an effort to win the competitive battle.

There is no reason to believe that any of the data the FCC used in constructing its benchmark rates reflect normal competitive conditions or would allow an accurate prediction of truly competitive cable rates which provide for recovery of legitimate costs and a fair return on investment.

B. The FCC's Failure to Consider Cable Costs Renders its Benchmark Rates Inaccurate and Irrational.

The only variables the FCC considered in devising its benchmark rates were cable rates, number of cable subscribers, number of cable channels, and number of cable satellite channels. Something very important is missing -- costs. A cable system operating in New York City plainly has different costs than a system operating in Ottumwa, Iowa. A cable system operating in Alaska has different costs than one operating in Florida. A cable system operated by a large MSO has different costs than a stand-alone system or one operated by a small or mid-sized group owner. MSO systems routinely enjoy enormous "price breaks" on the programming they buy, the equipment they buy, and many other cost items. The FCC took none of this into account in devising its benchmark rates. As a result, those rates would penalize some operators (such as the Petitioners here) by making it impossible

and equipment and other essential items for a substantially lower price (due to volume discounts and similar price breaks) than can the Petitioners. This is neither fair nor rational.

It is no answer to say that cable systems have the option of making an alternative cost of service showing. Such showings are expensive and difficult to make (indeed, they are impossible at the present time, given that the FCC has not yet adopted standards to govern them). The burden of making such showings thus falls disproportionately hard on a system which is smaller in size or which is operated by a smaller-sized cable company. Yet the FCC's current benchmarks are unfairly skewed to benefit larger cable companies, such as the major MSOs. Moreover, the irrationality of the FCC's announced benchmark rates is not ameliorated by the fact that some other portion of the FCC's regulations may be rational. The fact that one part of a scheme of regulation can be justified is no license to create another that cannot. The failure of the FCC to take any account of costs and differentials in costs in devising the benchmark rates makes those rates invalid.

C. The Benchmark Rates are Invalid Because the Survey Data Used to Construct Them Was Concededly Inaccurate.

The FCC itself has admitted that the survey data used to devise the benchmark rates contains errors. Report and Order, Appendix E. Indeed, despite the fact that the NCTA provided the FCC with data which corrected some of those errors, the FCC has declined to use the corrected data. Id. at 6 n.11. To base a regulation on data which contains inaccuracies may, in some

circumstances, be rational. But to base a regulation on admittedly inaccurate information when other, more accurate information is available and could be used is not a rational course.

D. The Analytic Premises Employed by the FCC to Devise the Benchmark Rates are Irrational.

Central to the FCC's method of devising the benchmark rates is the FCC's "best estimate" that the price per channel differential between competitive and non-competitive systems is a minus 9.4%. The FCC has admitted, however, that this "best estimate" is merely an approximate midpoint within a range of differentials running from minus 3.6% to minus 15.2%. All differentials falling within this entire 11.6% range are subject to the same 95% degree of confidence level. Report and Order, Appendix E at ¶ 31. Thus, the 10% "competitive differential" chosen as a "best estimate" by the FCC is nearly three times as great as the lowest alternative figure which the FCC could have relied on with precisely the same degree of confidence. In light of this admittedly "relatively large" 11.6% error range (3.6% to

unsupported "best guess" as to what the "right" number in the large range of equally valid numbers may be.

The benchmark rates are based on other false and irrational premises as well. Indeed, most of the FCC's critical assumptions in constructing the benchmark rates cannot be justified. For example, it is difficult, if not impossible, to accept that "the determinants of prices per channel are the same, and have the same association with prices, for competitive and non-competitive community units." Report and Order, Appendix E at ¶ 32. Equally erroneous is the FCC's assumption that cable prices are "in equilibrium." Id. As noted, cable prices are affected by greenmail and "price wars" as well. The FCC has also acknowledged that the benchmark rates were derived "based on an analysis of cable rates that presumptively recovered costs." Id. at p. 244 n.946. But, as previously observed, there is no evidence to

rates, thus compounding the errors noted above in basing benchmark rates on a survey skewed toward cable systems with destructive rather than effective competition. This is not consistent with statutory requirements or Congressional intent. Here again, it is no answer to point to the option of a cost of service study. The benchmark rates, no less than rates set by a cost of service showing, must take account of the mandatory factors spelled out in the Act -- including cost recovery and reasonable profit.

B. The Benchmark Rates Violate the Act by Applying Equally to Both Basic and Non-basic Cable Programming Services.

The FCC should fully reconsider its decisions to adopt the same competitive benchmark for cable programming services (i.e., non-basic tiers, excluding pay-per-view and pay-per-channel services) that it adopted for the basic service tier, and to apply it in the same manner.

As a threshold matter, however, the FCC should reconsider whether it is appropriate to use benchmarking as the manner of implementing the regulatory requirements for cable programming services under the 1992 Cable Act. The 1992 Cable Act clearly established distinct approaches to rate regulation of the basic service and non-basic service tiers, and these distinct approaches reflect different regulatory purposes and expectations.

Basic service rates are intended to be regulated directly, under a regulatory scheme which establishes the outer limits at or below which rates will be considered reasonable based on a standard of what is charged by cable systems that are "subject to effective

competition." In contrast, rates for non-basic cable programming services are not intended to be regulated -- under the "effective competition" or any other reference standard -- except in response to complaints "identifying, in individual cases, rates for [such services] that are unreasonable." Compare 47 U.S.C. § 543(b) with 47 U.S.C. § 543(c).

For basic service rate regulation, the Cable Act authorizes the FCC to adopt "formulas" in recognition of the need to "reduce the administrative burdens" that are likely to accompany a scheme of direct regulation. However, in the case of cable programming service rate regulation, the Cable Act simply requires the FCC to prescribe "criteria" for identifying unreasonable rates upon complaints in individual cases. Id.

Regarding "factors" to be considered by the FCC in prescribing the respective regulatory schemes, the Cable Act further evinces an intention to foster a different kind of analysis for non-basic service rates than it mandates for basic service rates, requiring the FCC to consider in the case of the former (1) "the history of rates for cable programming services of the system, including the relationship of such rates to changes in general consumer prices," and (2) "the rates, as a whole, for all the cable programming,

for cable programming service rates are a reflection of the different purposes which Congress sought to achieve with respect to basic rates and to cable programming rates. As to basic service rates, Congress intended to bring down prices on a national, industry-wide basis in order to make basic cable service generally more affordable to consumers. The legislative history of those provisions of the Act relating to basic service rates indicates that Congress intended to provide "a low priced tier" through which all broadcast signals will be available to consumers. House Committee on Energy and Commerce, H.R. Rep. No.102-628, 102d Cong., 2d Sess. 82 (1992) ("House Report"). To achieve this goal, Congress authorized the FCC to "decide as a policy matter to keep the rates for basic cable service as low as possible." H.R. Conf. Rep. No.862, 102d Cong., 2d Sess. 63 (1992) ("Conference Report").

With respect to non-basic cable programming services, however, Congress intended only to set up a means of dealing with the aberrant "renegade" whose rates clearly lie outside the typical industry range. House Report at 30. Unlike the generalized price policy evident in the basic tier provisions, the non-basic tier regulation was "intended to protect consumers against specific instances of unreasonable rates for subscription to cable programming services." Id. at 79 (emphasis added).

The benchmarking scheme adopted by Congress for basic service rate regulation is not necessary to achieve the aim of Congress with respect to "renegade" complaints in "specific instances," and it is not as suitable to the task as some of the other options that

the FCC considered during its rate regulation rulemaking. (For example, a proposal assuming that systems have unreasonable rates if they rank among the top 2-5 percent of all systems in terms of rates charged for cable programming services would identify those systems whose rates were unnecessarily high or substantially above the average, which is precisely what the FCC's regulatory "criteria" are supposed to do.)

Instead of focusing on the targeted few "bad actors" within the industry, the benchmarking scheme -- when applied to cable programming rates -- is likely to embroil a large number of cable systems in complaint proceedings even though their cable program rates are not on the outer edge of the industry. Whereas operators may be able to conform their basic service rates to presumably lower benchmarks through retiering of non-broadcast services, no similar option is available regarding the application of benchmarks to cable programming services. While benchmarking is useful in a scheme imposing a burden to show that a rate is reasonable, it amounts to awkward regulatory overkill where the burden is to show that rates are unreasonable.

If, however, the FCC decides upon reconsideration to employ a benchmarking approach for non-basic as well as basic service rate regulation, the FCC should not use the same benchmark for both regulatory schemes. Based on the previous discussion of the differences established by Congress between rate regulation for

service rates than it does for regulation of basic service. To the extent that Congress generally sought to avoid having the basic tier "serve as the base that allows for marginal pricing of unregulated services," Conference Report at 63, benchmarks calculated for basic service rates should be designed to serve a different function than Congress intended to be served by the regulatory mechanism employed to address "specific instances" of unreasonable rates in "individual cases."

The FCC's determination that "tier neutrality outweighs other potentially conflicting statutory or other considerations that might warrant different rate standards for the basic and higher tiers," Report and Order at p.246 n.949, is even less convincing

pass through of increased costs for obtaining such programming. An increase of costs for cable programming services is more likely to occur and also likely to be much higher than any increase in costs for basic tier programming, since the latter consists primarily of broadcast signals. This distinction is a critical one which must be taken into account in the use of benchmarks for regulating cable programming services.

IV. The FCC Should Establish an Effective Date which Occurs After the FCC Has Completed Its Reconsideration Process and All Additional Rulemaking and Form Issuances Required to Implement its Rate Regulations.

It is indisputable that the new cable rate regulations are complex and will require significant decision-making and adjustments by cable operators. In light of the major steps yet to be completed by the FCC (including, among many, the issuance of further rules to govern cost-of-service standards and rate increases), the FCC has already recognized the need to defer

become familiar with the results of the completed reconsideration process and any further rulemaking and form issuances required to implement the rate regulations.

V. FCC Rate Regulations that Limit Rate Increases to One Per Year Should Establish the Date of the Last Increase as the Point from which the Restricted Period Will Be Calculated.

One of the Questions submitted to the Commission's staff in preparation for the May 13, 1993 Cable Rate Workshop was "How often can cable operators file rate increases?" (Question 24, page 8, Public Notice dated and issued May 13, 1993.) In response to Question 24, the staff stated that "Absent a showing of special circumstances justifying an earlier increase, cable operators should file rate increases for the basic service tier no more than once per year." The Commission should make clear on reconsideration that the date of implementation of the last basic service tier increase by the cable operator should mark the start of the one-year period, even if that date occurred prior to the adoption of the rate regulation regime. In other words, after the freeze expires, cable operators should be permitted to file for and to effectuate a basic service tier rate increase to become effective one year after the prior-to-regulation rate was established, and without regard to the status of any regulatory review of the operator's current rates.[3/] Moreover, changes in

3/ Thus, a system which last increased its rates prior to becoming subject to rate regulation would be permitted a rate increase one year after that prior increase and would not be unfairly required to wait two years or longer before obtaining a rate increase to offset its increased costs.

basic service tier rates should be allowed to become effective upon the conclusion of the 30- or 90-day notice period, without waiting for the outcome of any extended review of the submitted rates by the franchising authority, since the process is in any event subject to the rollback/refund procedures.

One final matter relating to the Commission's Report and Order warrants reconsideration. The Commission's rate rules preclude a cable operator whose rates are below the benchmark from raising its rates to the benchmark level, without an expensive and onerous cost-of-service analysis. Cable operators should be allowed to do so. Once the benchmark rates are corrected (to eliminate the flaws described in this Petition), the Commission's own theory of the competitive versus non-competitive rate situation should permit rates to rise to the benchmark level. Requiring cable operators whose rates are below the benchmark to submit a complex cost-of-service showing in order to recover cost increases incurred in upgrading the service adds an unnecessary and unjustified layer of rate regulation.

VI. Conclusion

For the foregoing reasons, the Commission should reconsider and rescind its benchmark formula and tables; should devise a benchmark formula and tables based on accurate data truly reflective of competitive cable rates, cable costs and a fair return on investment; and should abandon the use of benchmark rates in connection with regulatory oversight of cable program service rates. The Commission should also establish an effective date for

its new rate regulation falling at least 60 days after the date of issuance of final regulations as to all relevant aspects of the new regulatory scheme and also issuance of all necessary forms. Finally, the Commission should allow the annual rate increase to be implemented on the anniversary of the implementation of a cable system's last preceding rate increase.

In implementing the 1992 Cable Act, the Commission should act judiciously to minimize the disruption which the rate regulation regime will impose on the industry. Since the earlier act of deregulation, cable has seen the development of new networks and the expansion of cable into rural areas. The new regime should be designed to preserve this element of growth in service as much as possible.

Respectfully submitted

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